No. 98-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

R.M. SMITH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION

MARCIA D. GREENBERGER
NEENA K. CHAUDHRY
VERNA L. WILLIAMS
Of Counsel
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180

RENEE M. SMITH*
Pro Se
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

August 26, 1998

*Counsel of Record

19 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit correctly held that the National Collegiate Athletic Association, a membership organization composed of federally funded colleges and unversities, is subject to the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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BRIEF IN OPPOSITION

Respondent Renee Smith respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Third Circuit's decision holding that the National Collegiate Athletic Association ("NCAA") is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*.

STATEMENT OF THE CASE

Respondent Renee Smith filed her original complaint in this case in August 1996, alleging, *inter alia*, that the NCAA engaged in a pattern and practice of sex discrimination in

violation of Title IX by granting a disproportionate number of waivers of eligibility requirements under NCAA bylaws to male student-athletes. The NCAA moved to dismiss this claim on the basis that Smith had failed to allege that the NCAA is a recipient of federal aid. In responding to the motion to dismiss, Smith argued that the NCAA was subject to Title IX's requirements by virtue of its relationship to its member colleges and universities -- that is, it receives federal financial assistance indirectly in the form of dues from its federally funded member institutions and it acts as their agent with respect to the governance of intercollegiate athletics.

The district court granted the NCAA's motion to dismiss the Title IX claim on the ground that Smith had failed to allege that the NCAA is a recipient of federal aid. Recognizing its obligation to hold the allegations of *pro se* litigants to a lesser standard of scrutiny, however, the district court addressed Smith's argument, presented in her brief in opposition to the motion to dismiss, that the NCAA is subject to Title IX based on its relationship to its federally funded member institutions. The court ruled that the NCAA's receipt of membership dues from its federally funded member schools and its governance of the member schools' intercollegiate athletic programs were insufficient to subject the NCAA to Title IX's requirements. Accordingly, on May 21, 1997, the court dismissed the complaint.

The Third Circuit, in an opinion by Judge Greenberg, reinstated Smith's Title IX claim and held that the district court erred in denying Smith's motion to amend her complaint. In so doing, the Third Circuit began its analysis with the proposition that the NCAA acts as a surrogate for its federally funded member institutions, from which it concluded that Title IX's purposes would be defeated by drawing an artificial distinction between the NCAA and its member institutions. Thus, consistent with a wealth of authority holding similarly structured athletic associations accountable under Title IX and analogous statutes, the Third Circuit held that the NCAA is subject to Title IX. *See Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 271-72 (6th Cir. 1994) (athletic association subject to Title IX); *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn. 1996), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996) (athletic conference subject to Section 504 of Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*); *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997) (athletic association covered by Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*); *Sandison v. Michigan High Sch. Athletic Ass'n, Inc.*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd in part on other grounds*, 64 F.3d 1026 (6th Cir. 1995) (athletic association subject to Section 504); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 857 F. Supp. 654 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994) (athletic association subject to Section 504). The court of appeals specifically relied on the Sixth Circuit's decision in *Horner*, which held that the Kentucky High School Athletic Association ("KHSAA") was subject to Title IX because it received dues from its federally funded member high schools and because it acted as an agent of the state board of education, which also received federal dollars. Rejecting the district court's attempt to distinguish *Horner* on the grounds that the association in that case was designated as an agent of the federal funds recipient by state statute, the Third Circuit held that "[t]he NCAA acts no less than the association in *Horner* as an agent of its member institutions merely because it lacks statutory authority for its activities." Pet. App. 14a.

Moreover, the Third Circuit specifically found that its ruling does not conflict with this Court's decision in *United States Department of Transportation v. Paralyzed Veterans of*

America, 477 U.S. 597 (1986). As the court of appeals recognized, the issue in *Paralyzed Veterans* was whether commercial airlines were "recipients" of federal funds within the meaning of Section 504 of the Rehabilitation Act. Organizations representing the disabled argued that the airlines were recipients because funds received directly by airport operators benefited the airlines once the funds were spent on the construction of runways, *inter alia*. The Third Circuit correctly noted, however, that the Court "drew a distinction between those entities which indirectly *benefit* from federal assistance and those that indirectly *receive* federal assistance, holding that only those [that] *receive* federal funds are within the statute." Pet. App. 15a (emphases added). Accordingly, the Court held that the airlines were merely incidental beneficiaries of federal funds and hence not subject to Section 504. The Third Circuit then concluded that *Paralyzed Veterans* does not control this case, because the NCAA is an indirect recipient of federal funds whose relationship to its members is markedly different from that of the airlines to the airport operators. "[U]nlike the commercial airlines in *Paralyzed Veterans*, the NCAA is not merely an incidental beneficiary of federal funds. Quite to the contrary . . . the relationship between the members of the NCAA and the organization itself is qualitatively different than that between airlines and airport operators, for . . . it would be unreasonable to characterize the latter as surrogates for the airlines." Pet. App. 16a. Thus, the Third Circuit held that if, as Smith alleged in her complaint, the NCAA receives dues from its members which receive federal funds, the NCAA would be subject to the requirements of Title IX.

REASONS FOR DENYING THE WRIT

This case conflicts neither with any decision of this Court nor with any court of appeals opinion, contrary to petitioner's assertions. Petitioner attempts to manufacture a

conflict between this case and *Paralyzed Veterans*. As the Third Circuit astutely observed, however, unlike the relationship between the airlines and airport operators at issue in *Paralyzed Veterans*, the NCAA is much more than an "incidental beneficiary" of federal funds; it *is* the sum of its member colleges and universities. Thus, drawing an artificial distinction between the NCAA and its member schools would only create a perverse situation whereby individual schools could attempt to evade Title IX's obligations by doing through the NCAA that which they are prohibited from doing on their own. Petitioner's argument that this case conflicts with decisions of other federal circuits is equally unavailing. The court of appeals cases cited by petitioner either follow *Paralyzed Veterans* and hence are inapplicable for the same reasons, or do not address the issue of whether athletic associations are subject to Title IX. Therefore, further review of this case is not warranted.

I. THE DECISION OF THE THIRD CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *PARALYZED VETERANS*

Petitioner's central argument for why this Court should grant review of this case is that the Third Circuit's decision conflicts with this Court's decision in *Paralyzed Veterans*. This argument fails, however, because the facts of this case are entirely distinguishable from those in *Paralyzed Veterans*.

First, unlike the airlines in *Paralyzed Veterans*, the NCAA actually receives money from its federally funded member institutions in the form of dues and in turn governs their intercollegiate athletics programs, bringing it within the ambit

of Title IX.[1] *See* 20 U.S.C. § 1687(4) (defining "program or activity"); 34 C.F.R. § 106.2(h) (defining "recipient"); *Horner*, 43 F.3d at 271-72 (holding that high school athletic association that receives dues from its federally funded member schools and acts as agent in governing interscholastic athletics programs was subject to Title IX). This fact alone distinguishes this case from *Paralyzed Veterans*, where the Court found that "not a single penny of the money [received by airport operators] is given to the airlines." 477 U.S. at 605. Nevertheless, the organizations of disabled citizens tried to argue that commercial airlines were indirect recipients of federal aid because the "money given to airports is simply converted by the airports into nonmoney grants to airlines." *Id.* at 606. The Court rejected their argument, and as the Third Circuit noted, drew a distinction between those entities that indirectly *benefit* from federal assistance and those that indirectly *receive* federal assistance. *Id.* at 606-07 (emphases added).

Moreover, the NCAA receives direct federal funding through a grant from the Department of Health and Human Services to the NCAA's National Youth Sports Program. This issue was raised in the Brief of *Amici Curiae* National Women's Law Center *et al.* filed in support of Smith in the Third Circuit. *See amicus* brief at 5 n.3. Although the Third Circuit did not rule on this argument, it constitutes yet another reason why *Paralyzed Veterans* is inapplicable to this case and is an alternate basis for holding the NCAA subject to Title IX.[2]

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[1] The NCAA does not dispute that it receives dues from its members which receive federal funds. Pet. at 9 n.5.

[2] In *Cureton v. National Collegiate Athletic Ass'n*, No. Civ.A.97-131, 1997 WL 634376 (E.D. Pa. Oct. 9, 1997), the district court considered the question of whether the NCAA receives direct federal financial assistance in the context of a class-action lawsuit claiming that the NCAA is subject to Title VI. The court concluded that the NCAA is a "program or activity" covered by Title VI. It then considered whether the NCAA receives federal funds directly through the National Youth Sports Program and held that the plaintiffs had submitted enough evidence on this issue to withstand the NCAA's motion for summary judgment. Thus, the court held that the plaintiffs should be allowed to prove at trial that the NCAA receives direct federal funds through this program. *Id.* at *2. Accordingly, if Smith has the opportunity to amend her complaint on remand, as the Third Circuit held she should be allowed to do, she could allege that the NCAA is a direct recipient of federal funds as an alternative basis for holding the NCAA subject to Title IX.

Second, unlike the relationship between the airlines and airport operators in *Paralyzed Veterans*, the NCAA *is* the sum of its federally funded member institutions. Therefore, the Third Circuit properly rejected the NCAA's argument that it is beyond Title IX's reach, because the distinction that the NCAA tries to draw between itself and its member schools is totally artificial. As the Third Circuit found, the NCAA acts as an agent of its member institutions: "The NCAA is a voluntary organization created by and comprised of the educational institutions which essentially acts as their surrogate with respect to athletic rules." Pet. App. at 14a. The Third Circuit's finding is buttressed by this Court's characterization of the NCAA as an agent of its collective membership of colleges and universities. *See NCAA v. Tarkanian*, 488 U.S. 179, 196 (1988).[3] With the assent of its membership, the NCAA "adopt[s] rules, which it calls 'legislation,' . . . governing the conduct of the intercollegiate athletic programs of its members," and "[b]y joining the NCAA, each member agrees to abide by and to enforce such rules." *Id.* at 183. The NCAA's own constitution describes some of its purposes as follows: "[t]o formulate, copyright and publish rules of play governing intercollegiate athletics," and "[t]o legislate, through

[3] While the Court in *Tarkanian* held that the NCAA is not a state actor for the purposes of the Fourteenth Amendment, its reasoning was that the NCAA is an agent of its collective membership, including private institutions, not of any one state university. 488 U.S. at 193, 196.

bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics." *1993-94 NCAA Manual* 1, Const., Art. 1, § 1.2 (in Appellant Smith's App. to Third Circuit Brief at 12). As one court described the relationship between the NCAA and its member schools in the context of determining the association's tax exempt status:

> The activities of the NCAA are of the type the member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges . . . .

NCAA v. Kansas Dep't of Revenue, 781 P.2d 726, 730 (Kan. 1989). Hence the decisions of the NCAA are the decisions of the member institutions, and the functions of the NCAA are those functions delegated to it by its members. *Id.* at 727 ("The voting membership [of the NCAA] is wholly composed of four-year colleges and universities and athletic conferences comprised of NCAA member institutions.").[4]

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[4] In *Kansas Dep't of Revenue*, the NCAA itself adopted this characterization in order to obtain a state sales tax exemption for educational institutions. To qualify for such an exemption, the NCAA argued that it stands in the shoes of its member institutions and is nothing more than a membership organization composed of colleges and universities. The Kansas Supreme Court agreed. 781 P.2d at 726-30.

This surrogate relationship between the NCAA and its member institutions renders *Paralyzed Veterans* inapplicable to this case. The airlines in that case were not agents of the airports, and they did not govern the operations of airports as the NCAA governs the operations of its members' athletics programs. Rather, the airlines received only tangential, nonmonetary benefits -- e.g., runways, taxiways, and ramps -- from airport structures built using federal aid. Recognizing that such a relationship was too tenuous to consider the airlines recipients of federal aid, the Court held that they were merely incidental beneficiaries of the airports' use of the federal aid. By contrast, the Third Circuit's decision here correctly held that the relationship between the NCAA and its member schools is "qualitatively different" than that between the airlines and the airport operators in *Paralyzed Veterans*. There is no real distinction between the NCAA and its member institutions; hence the NCAA is not merely an incidental beneficiary of the federal aid received by its members, and *Paralyzed Veterans* does not control this case. In fact, in order to provide a useful parallel to this case, the factual scenario in *Paralyzed Veterans* would have had to be as follows: An airport received federal funds to run the airport, then stepped aside and created another entity -- Entity X -- to actually run the airport, and then Entity X claimed that it was not subject to the civil rights statutes. *Paralyzed Veterans* does not countenance this kind of subterfuge, which the NCAA seeks to accomplish here.

Furthermore, if this Court were to accept petitioner's argument that the NCAA is not subject to Title IX, member educational institutions could attempt to do indirectly through the NCAA that which they are prohibited from doing under Title IX directly. For example, if the NCAA through a vote of its members issued discriminatory scholarship legislation -- e.g., stating that no more than 10% of athletic scholarships can be awarded to women -- the member schools might try to hide

behind the NCAA because it would not be subject to Title IX.[5] Such a result would be contrary to the letter and spirit of Title IX and would undermine Congress' intent to "accord [Title IX] a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (internal quotation marks and citations omitted). Therefore, the Third Circuit's decision is in accord with this Court's opinion in *Paralyzed Veterans*.

II. THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUITS

Petitioner also argues that the Third Circuit's decision conflicts with decisions of other federal circuits, relying primarily on cases that implement the holding of *Paralyzed Veterans*. These progeny of *Paralyzed Veterans*, however, are inapplicable to this case for the same reasons that *Paralyzed Veterans* is inapplicable. Moreover, the other cases cited by petitioner fail to address the relevant issue of whether membership organizations of federally funded entities are subject to Title IX. Hence there is no division among the federal circuits over the Title IX issue decided by the Third Circuit.

First, petitioner contends that the Third Circuit's decision conflicts with decisions of other circuits recognizing that Title

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[5] Of course, an individual institution that complied with such a discriminatory rule would not be relieved of Title IX's mandate not to discriminate, the rules of any association notwithstanding. 34 C.F.R. § 106.6(c) ("The obligation to comply with [Title IX] is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association . . . ."). However, since no one member has the authority to change NCAA rules, obtaining relief against an individual institution in such a situation would be virtually impossible unless the NCAA itself was subject to suit.

IX, Section 504, and Title VI contain parallel language and should be interpreted in the same manner. Petitioner also cites a number of cases in other circuits holding, consistent with *Paralyzed Veterans*, that section 504 does not cover mere beneficiaries of federal aid, such as a counselor employed at a hospital receiving federal aid, *Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116, 119-20 (7th Cir. 1997); a baseball club that benefited from a city's federal grant for stadium improvement, *Disabled in Action v. Mayor & City Council*, 685 F.2d 881, 884-85 (4th Cir. 1982); or a bank that made student loans that are subsidized and guaranteed with federal funds, *Gallagher v. Crogham Colonial Bank*, 89 F.3d 275 (6th Cir. 1996). Petitioner's arguments have merit only if its central premise -- that the Third Circuit's decision in this case conflicts with the holding in *Paralyzed Veterans* -- is correct. As explained in the previous section, this premise is false.

Second, petitioner claims that the Third Circuit's decision conflicts with decisions involving third-party liability of federal funding recipients, citing cases that are removed from their proper context, and in any event, have no bearing on the issue in question. *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), and *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014 (7th Cir. 1997), addressed the issues of when a school district is liable for student-to-student sexual harassment and teacher-to-student sexual harassment, respectively. Neither of these cases even remotely addressed whether an athletic association that receives money from federally funded schools for governing their intercollegiate athletic programs is covered by Title IX. Moreover, there was no question of Title IX coverage in these cases, as it was clear that the schools were subject to Title IX. The only question was, in light of Title IX's contractual nature, what kind of notice must a school have before it can be subjected to liability in damages for the

sexual harassment of its students by teachers or other students.

Finally, petitioner asserts that the Third Circuit's decision conflicts with the Tenth Circuit's decision in *NCAA v. Califano*, 622 F.2d 1382 (10th Cir. 1980), which held in part that the NCAA did not have standing in its own right to challenge certain Health, Education and Welfare Department ("HEW") regulations promulgated under Title IX. The Tenth Circuit adopted the reasoning of the district court, which accepted the NCAA's allegation that it received no federal financial assistance and noted that the NCAA raised no issue of possible direct applicability of the challenged regulations to itself as an association. Accordingly, the district and circuit courts held that the regulations could not result in any injury to the NCAA. *Id.* at 1387; *NCAA v. Califano*, 444 F. Supp. 425, 430-31 (D. Kan. 1978).

At issue here, however, are direct actions taken by the NCAA itself. *Califano*, moreover, was decided before *Grove City College v. Bell*, 465 U.S. 555 (1984), in which this Court held: "Nothing in [Title IX] suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance." *Id.* at 564. Thus, the *Califano* court would not have had any occasion to consider the issues presented in this case, such as whether the NCAA received federal aid indirectly through its member institutions and whether its surrogate relationship with its members should subject it to Title IX. Even the NCAA at the time of *Califano* was not the same as the NCAA today -- for example, its purpose in 1980 was "limited to the promotion and governance of intercollegiate athletics for men."[6]

[6] Petitioner's statement that *Califano* recognized that the NCAA was not a surrogate for its member institutions is thus misleading. Pet. at 21 n.13. The NCAA's interests at that time were clearly not identical to the interests of its members because the member institutions also had an interest in promoting and governing women's athletics, an interest that was represented in *Califano* by the NCAA's counterpart, the Association for Intercollegiate Athletics for Women ("AIAW"). *See Califano*, 444 F. Supp. at 433. The NCAA today governs intercollegiate athletics for men and women, and its interests with respect to athletics are those of its member schools.

Califano, 444 F. Supp. at 433. Thus, *Califano*'s holding that the Title IX regulations do not apply to the NCAA at that time does not carry the weight that petitioner assigns it and creates no conflict with the decision of the Third Circuit here.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARCIA D. GREENBERGER
NEENA K. CHAUDHRY
VERNA L. WILLIAMS
Of Counsel
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

RENEE M. SMITH*
Pro Se
P.O. Box 2334
Wintersville, OH 43953
(740) 264-6986

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*Counsel of Record